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Nos. 03-334, 03-343

IN THE

Supreme Court of the United States

SHARIQ RASUL ET AL.,

Petitioners,

v.

GEORGE W. BUSH ET AL.,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF FORMER AMERICAN PRISONERS OF WAR AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Prisoners of war are in a vulnerable situation, at the mercy of their captors and beyond the reach of their own government. Force of arms cannot protect them, and the force of law relies on a reciprocal, consensual regime of understandings among the combatant nations robust enough to be recognized and respected despite the emotions and exigencies of war. *Amici* have been in that vulnerable position, have benefited from these international understandings, and have suffered in their absence. The Geneva Conventions on the treatment of those detained in a combat zone, the body of law amplifying those conventions, and the United States' commitment to implementing them, were, at that critical juncture, their primary protection and the only means our government had to protect them.

Amici are Leslie H. Jackson, Edward Jackfert, and Neal Harrington, former American prisoners of war detained by the German and Japanese governments during World War II. Mr. Jackson is the Executive Director of American Ex-Prisoners of War, a non-profit, congressionally chartered veterans organization that represents approximately 50,000 former prisoners of war and their families. Mr. Jackfert is the former National Commander of the American Defenders for Bataan & Corregidor, Inc., an organization that supports former POWs held by the Japanese during World War II. Mr. Harrington is also involved in POW activities, particularly relating to those who, like he and Mr. Jackfert, survived the infamous Bataan Death March.

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[1] Counsel for all parties have consented to the filing of this brief, and *amici* have filed those consents with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amici* and their counsel, has made a monetary contribution to this brief's preparation and submission.

Mr. Jackson was captured by the German Army on April 24, 1944, when his B-17 bomber crashed. Jailed and interrogated for approximately one week, he was then transported to Stalag 17, a converted concentration camp. In his 13 months of captivity, Mr. Jackson was granted the bare necessities: shelter, minimal food, and the ability to socialize with other American POWs. While the experience was harsh and unpleasant, Mr. Jackson was never tortured or otherwise hurt by the German guards. To follow the terms of the Geneva Conventions of 1929, to which Germany was a party, Mr. Jackson's German captors placed the appropriate Geneva Convention signage in the barracks, permitted the International Red Cross to ship basic necessities to the POWs, and allowed a Geneva inspector to survey the premises. Mr. Jackson believes that his survival and relatively good health while in captivity are the result of the German Army's adherence to the 1929 Geneva Conventions.

The experiences of Mr. Jackfert and Mr. Harrington in the custody of Japan, which had not ratified and did not purport to follow the 1929 Geneva Conventions, offer a sharp contrast. Both men were serving with the U.S. Army in the Philippines when it surrendered to the Japanese in 1942, and both subsequently served several years of hard captivity beyond the reach of any Geneva Convention protections. Both were part of the Bataan Death March and its well-documented horrors. Mr. Harrington was forced into slave labor in a Japanese coal mine, and saw his compatriots starved, beaten, and killed. Mr. Jackfert was also forced into slave labor and suffered the extreme effects of heavy labor and cruelly inadequate nourishment, going from 125 pounds to 90 pounds in a matter of months. There was no Geneva signage, no recognition of prisoner rights, and virtually no Red Cross access.

Nor were the experiences of Mr. Harrington and Mr. Jackfert atypical. Studies have determined that the death rate of U.S. military personnel interned by Japan was as high as 40%, while the death rate of personnel captured and interned by Germany was little more than 1%. *See* Gary K. Reynolds, Congressional Research Service, *U.S. Prisoners of War and Civilian American Citizens Captured and Interned by Japan in World War II: The Issue of Compensation by Japan* 10 (updated July 27, 2001) (citing Charles A. Stenger, *American Prisoners of War in WWI, WWII, Korea, Vietnam, Persian Gulf, Somalia, Bosnia, and Kosovo* (2000)); *see also Encyclopedia of Prisoners of War and Internment* 329, 335 (Jonathan F. Vance ed., ABC-CLIO 2000) (providing similar estimates). Moreover, while it was rare for American POWs detained in Germany to be tortured, the opposite was true for American POWs in Japan. "No one can adequately impart the suffering most Allied prisoners endured [in Japan] . . . . They were beaten, kicked, robbed . . . and were buried alive. . . . [T]he overwhelming majority endured 'hell on earth' . . . ." *Encyclopedia of Prisoners of War and Internment*, *supra*, at 336.[2]

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[2] Notably, the difference in treatment of American POWs was not merely the result of differences between the Germans and the Japanese. Contrary to their humane treatment of American POWs, the Germans treated prisoners from Russia, which had not ratified the Geneva Conventions of 1929, with absolute cruelty. "Of 5.7 million captured Red Army soldiers, about 3.3 million died in German captivity — a staggering mortality rate of 57 percent." *Id.* at 329. Nor was this simply a function of the harsh Russian climate. German soldiers deliberately starved Russian POWs, forced them into slave labor, and sent some to the gas chambers. *Id.* at 331. Thus, the importance of the Geneva Conventions — not simply of their existence, but of the reciprocity enjoyed by mutual parties to the Conventions — cannot, and should not, be underestimated.

As a result of their own experiences, *amici* have an interest in fostering the development, acceptance, and enforcement of international norms pursuant to which prisoners of war and others captured during armed conflicts will be treated humanely and in accordance with the rule of law. In particular, *amici* wish to ensure that the treatment by the United States of foreign detainees during the ongoing armed conflicts in Afghanistan, Iraq, and elsewhere is such that the United States and former American POWs retain the moral authority to demand fair and humane treatment for any future Americans detained by foreign governments. *Amici* also support the involvement of the judiciary in the development and evolution of the substantive and procedural norms protecting such persons on the conviction that a well-developed and stable body of laws and rules is more likely to result in even-handed, predictable, and humane treatment of detainees by the nations of the world.

INTRODUCTION AND SUMMARY OF ARGUMENT

The principle that humanitarian norms apply to prisoners of war and others detained during armed conflicts has at last, following a long history of horrors in captivity, achieved near-universal acceptance. Most famously realized in the various Geneva Conventions negotiated in the wake of the two world wars, these norms confer upon detainees both substantive rights and the right to a judicial determination of their proper status, thereby providing a predictable level of protection to those who are among the most vulnerable of the victims of war.

The United States has ratified the Geneva Conventions, expressly incorporated them into its written military regulations, and adhered to them in prior conflicts. Over the past half-century, moreover, the United States has played a prominent role in demanding that detainees be treated by foreign governments in accordance with the Geneva Conventions. Recently, however, the United States' treatment of detainees captured during the war on terrorism and its reluctance to reconcile its actions with the norms of the Geneva Conventions or submit them to the scrutiny of the courts, has resulted in widespread doubt about the United States' actual commitment to those norms.

Genuine, demonstrated commitment to the principles of the Geneva Conventions is vital to the United States' moral authority to demand compliance by other nations with those agreements. Contrary to the D.C. Circuit's conclusion that the courts should not be involved in this process, development of this body of law requires rather than excludes a judicial role. Even where executive discretion is broadest, the *fact* of review is a formidable protection. And there is law to apply here: impartial tribunals are particularly well-suited to determine whether the detentions at issue comply with the procedural and substantive guarantees that find expression in the Geneva Conventions, United States military regulations, and the United States Constitution. Indeed, the Conventions and military regulations themselves expressly contemplate the involvement of competent tribunals in making these determinations. Even if the detainees' claims are ultimately deemed to lack merit, independent judicial review would erase the suspicion of executive overreach and provide the international community with assurances that the United States' detentions are not arbitrary or in derogation of the Geneva Conventions.

Just as significantly, judicial review will enable the courts of the United States to contribute to the long-term development and evolution of international humanitarian law by giving meaning to, and filling the interstices in, the governing rules. This, in turn, will lead to a mature and stable body of rules that can be predictably applied by, and demanded of, all nations in all future conflicts.

In the decision below, the D.C. Circuit held that American courts lack jurisdiction to determine whether petitioners' rights were violated. Because this Court's prior cases have been unclear about the scope of the rights possessed by aliens abroad and the jurisdiction of the courts to enforce those rights, this area of law is in need of clarification. Moreover, because of the large number of detainees already in the custody of the United States military and the likelihood that more detentions will follow in connection with the global war on terror, the issue warrants the Court's immediate attention.

ARGUMENT

I. REVIEW OF THE DECISION BELOW IS NEEDED TO DETERMINE WHETHER THE FEDERAL JUDICIARY WILL HAVE ANY ROLE TO PLAY IN AN AREA OF IMMEDIATE AND LASTING INTERNATIONAL IMPORTANCE

In concluding that the courts lack jurisdiction to review petitioners' claims, the D.C. Circuit effectively held that the judiciary is to have no role at all either in protecting against potential abuses or errors by the executive in connection with the detention of aliens captured during armed conflicts, or in contributing to the evolution of the legal rules governing such detentions. Because of the significance of this ruling on the United States' vital interests in furthering the humane treatment of persons detained during wartime, such a drastic reversal of the ordinary presumption of judicial review should not be implemented prior to careful consideration of the issues by this Court.

A. The United States Considers Itself Bound By Rules Governing the Treatment of Detainees

While the United States' efforts to protect individuals detained during wartime date back to the earliest days of the Republic, human rights abuses suffered by prisoners and

civilians during the first and second World Wars were the stimulus for a series of multilateral agreements that today provide uniform and predictable standards for the humane treatment of prisoners of war and civilian victims of war. The first such multilateral agreements were the Geneva Conventions of 1929, which played a significant role in World War II. *See supra* pp. 2-3 & note 2. Ultimately, the international community negotiated the four Geneva Conventions of 1949, including the Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Third Convention" or "Geneva III"), and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("Fourth Convention" or "Geneva IV"), both of which the United States ratified in 1955. *See* Geneva III, 6 U.S.T. at 3316; Geneva IV, 6 U.S.T. at 3516.

The Third Convention provides prisoners of war with substantive rights to humane treatment during their detentions and procedural rights governing determinations of the status of detainees. The substantive protections apply to persons who are "[m]embers of the armed forces of a Party to the conflict" or "[m]embers of other militias and . . . volunteer corps . . . belonging to a Party to the conflict," provided that certain additional considerations are satisfied. *See* Geneva III, arts. 4, 6, 6 U.S.T. at 3320, 3324, 75 U.N.T.S. at 138, 142. The procedural protections ensure that if there is "any doubt . . . as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy" are protected by the Convention, "such persons shall enjoy the protection of the . . . Convention until such time as their status has been *determined by a competent tribunal*." *Id.* art. 5, 6 U.S.T. at 3324, 75 U.N.T.S. at 142 (emphasis added).

The Fourth Convention relates to the protection of civilians in times of war. It, too, provides substantive rights to humane treatment, as well as procedural rights relating to status determinations. *See* Geneva IV, art. 43, 6 U.S.T. at 3544, 75 U.N.T.S. at 314; Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L.J. 503, 511-12 (2003). In particular, with certain narrow exceptions, civilians who have been interned have the right promptly to challenge their detentions before an appropriate court or administrative board. *See* Geneva IV, art. 43, 6 U.S.T. at 3544, 75 U.N.T.S. at 314.

In sum, in addition to providing one set of substantive rights for prisoners of war and another set for civilians, the Geneva Conventions also guarantee procedural protections — including the involvement of competent tribunals — to ensure that detained individuals are properly categorized and are receiving the substantive protections to which their particular status entitles them. Pursuant to the Geneva Conventions:

> "[E]very person in enemy hands must have some status under international law: he is either a prisoner of war . . . covered by the Third Conventions, a civilian covered by the Fourth Convention, or . . . a member of the medical personnel . . . covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law."

Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror"*, 27-Fall Fletcher F. World Aff. 55, 66 n.49 (2003) (quoting International Committee of the Red Cross, *Commentary of the Fourth Geneva Convention* 51 (J.S. Pictet ed. 1952)).

The United States has chosen to implement the Geneva Conventions as part of its written military regulations. Thus, Army Regulation 190-8 states:

> [I]n accordance with Article 5, [Geneva III,] . . . . [a] competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities . . . and who asserts that he or she is entitled to treatment as a prisoner of war . . . .

U.S. Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-6 (1997); *see also id.* §§ 5-1b & 5-1g(1) (requiring status determinations by a competent tribunal and providing a right of appeal to interned civilians). These regulations provide a thoroughly articulated legal process requiring an independent status determination without exception and defining the roles and circumscribing the authority of officers in the field and reviewing authorities.

The United States has put its commitment to these norms in practice in past conflicts by providing procedural protections to verify the status of detainees. *See, e.g.*, U.S. Dep't of the Army, Field Manual on the Law of Land Warfare, FM 27-10 § 71(a) (1956) (providing for "a competent tribunal" to determine the status of "any person not appearing to be entitled to prisoner-of-war status who has committed a belligerent act or has engaged in hostile activities in aid of the armed forces and who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists"); MACV Directive No. 20-5, § 5(e) (Sept. 21, 1966, as amended, Dec. 16, 1966) ("[i]n . . . doubtful cases the necessity for a determination of status by a tribunal may arise"), *quoted in* Prisoners of War, 10 Whiteman, *Digest of International Law* 216 (1968); Dep't of Defense, *Final Report to Congress: Conduct of the Persian Gulf War* 578 (1992) (noting that the status of almost 1200 detainees from the 1991 Persian Gulf War was determined by tribunals). As these examples show, the use of tribunals traditionally has been an integral

component of the United States' treatment of persons captured on enemy soil.

B. Judicial Review of the United States' Detentions Promotes the Development and Evolution of a Stable Body of Rules That Can Be Predictably Applied by, and Demanded of, All Nations in All Future Conflicts

Through its support of multilateral treaties and the promulgation of written military regulations, both of which require the involvement of impartial tribunals as a check against potential executive excess and error, the United States has thus taken a strong stance in favor of treating detainees in accordance with the rule of law. However, as demonstrated by the strong international outcry against the United States' treatment of the Guantánamo Bay detainees, and the equally strong insistence by the Executive Branch that the United States is acting in full compliance with international law, disputes over the scope and application of the Geneva Conventions and other international rules are inevitable. Judicial review of the detainees' claims that they are being deprived of procedural protections to which they are entitled would have a number of ameliorating consequences.

In particular, the long-term development and stability of international rules governing the rights of detainees would benefit from the application of judicial review. It is a core part of the judicial role that courts act as a check against arbitrary excesses by executive-branch officials. Moreover, courts applying common-law methodologies are particularly well-equipped to dispassionately interpret written rules and regulations and to apply them without fear or favor where appropriate based on particular facts. As the courts hear more claims, the meaning and applicability of the Geneva Conventions can be examined and clarified. A body of adjudication, and the concomitant creation of more law, would therefore further the fundamental goal of the Geneva

Conventions that detainees captured during wartime are treated in accordance with a stable body of rules that can be predictably applied by, and demanded of, all nations. This is not to suggest that every status determination is subject to *de novo* review in the district courts, or to prejudge the nature of the review necessary to determine whether appropriate procedures have been followed and appropriate standards applied. It is merely to say that lines can be drawn that give life to protections and legitimacy to authority.

The United States' ability to demand international compliance with the norms expressed in the Geneva Conventions depends on the United States' own demonstrable compliance. The availability of judicial review can be a key component of demonstrable and principled compliance. History shows the importance of this concern, as the United States has, in the past, demanded that other nations treat American and allied prisoners in accordance with the principles of the Geneva Conventions, citing the requirements of international law and frequently contrasting the United States' record of compliance with the actions of the offending state.

For example, during World War I, the United States protested the mistreatment of American prisoners of war in Germany and demanded that the German government "'immediately take such steps as will effectively guarantee to American prisoners in its hands, both in letter and in spirit, that humane treatment which by all the principles of international law and usage is to be expected from the Government of a civilized state and its officials.'" Prisoners of War: Treatment, 6 Hackworth *Digest of International Law* § 577, at 278 (1943) (quoting Secretary of State (Lansing) to the Ambassador in Spain (Willard), telegram 850, Jan. 28, 1918, MS. Department of State, file 763.72114/3240a; 1918 For. Rel., Supp. 2, at 19).

Similarly, during World War II, the United States severely warned Japan that its leaders and citizens would be held accountable for the maltreatment of U.S. and allied soldiers, including the atrocities committed in the Bataan Death March and the abuse of Filipino civilians. *See* Maj. Michael L. Smidt, *Yamashita, Medina & Beyond: Command Responsibility in Contemporary Military Operations*, 164 Mil. L. Rev. 155, 174 (2000) (citing 203 Judgment Of The International Japanese War Crimes Trials In The International Military Tribunal For The Far East 49,748 (1948)).

When America went to war in Vietnam, the Government again reiterated its commitment to the principles of the Geneva Conventions and demanded the same of the enemy. Secretary of State Rusk stated unequivocally that "'[t]he United States Government has always abided by the humanitarian principles enunciated in the Geneva conventions and will continue to do so.'" Prisoners of War, 10 Whiteman *Digest of International Law*, § 7, at 214-15 (1968) (quoting Letter from Secretary of State Rusk to Jacques Freymond, Vice President of the International Committee of the Red Cross, *reprinted in* LIII Bulletin, Department of State, No. 1368, Sept. 13, 1965, at 447). Expressing that it was "'gravely concerned that some [U.S. military and civilian] prisoners may not be treated humanely,'" the United States contrasted its and its allies' treatment of enemy prisoners:

> "Viet Cong and North Vietnamese prisoners held by the Government of Viet-Nam are confined in camps regularly inspected by the [International Committee of the Red Cross]. These prisoners include many captured by U.S. forces and turned over to the Government of Viet-Nam for safekeeping under the provisions of the Geneva convention. Their treatment and the conditions of their confinement have been humane and in accord with the convention, as verified by these neutral observers."

Id. at 221-23 (quoting LVII Bulletin, Department of State, No. 1467, Aug. 7, 1967, at 170).

Similarly, following Iraq's invasion of Kuwait in August 1990, the United States joined other members of the U.N. Security Council in "[c]ondemning the actions by the Iraqi authorities and occupying forces to take third-State nationals hostage and to mistreat and oppress Kuwaiti and third-State nations . . . in violation of . . . the [Fourth] Geneva Convention" and other international agreements. U.N.S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg., U.N. Doc. S/RES/674 (1990).

Most recently, in response to the televised display of captured American soldiers by Iraqi authorities earlier this year, U.S. officials chastised this conduct as a violation of the principles of the Geneva Conventions. President Bush stated: "I expect [the U.S. prisoners of war] to be treated humanely . . . just like we're treating the prisoners that we have captured humanely. If not, the people who mistreat the prisoners will be treated as war criminals." White House Release, *President Discusses Military Operation* (Mar. 23, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/03/20030323-1.html. Deputy Secretary of Defense Wolfowitz similarly contrasted Iraq's treatment of prisoners with treatment accorded by the United States:

> We've seen those scenes on Al Jazeera that others have seen. We have reminded the Iraqis . . . that there are very clear obligations under the Geneva Convention to treat prisoners humanely, not to humiliate them, and in this case, I think we'll be in a position before long to enforce any violations of the Geneva Convention. We treat our own prisoners, and there are hundreds of Iraqi prisoners, extremely well. We feed them, we take care of them, they're very safe with us.

Dep't of Defense News Transcript, *Deputy Secretary Wolfowitz Interview with New England Cable News* (Mar. 23, 2003), *available at* http://www.defenselink.mil/transcripts/2003/t03242003_t0323nec.html.

As this historical record shows, U.S. treatment of enemy prisoners in accordance with the principles of the Geneva Conventions has been a powerful basis for demanding that American soldiers receive the same standard of treatment. General Eisenhower pithily explained this reasoning in his response to an inquiry by a Soviet general as to why the United States expended a high level of effort in its treatment of German prisoners:

> [I]n the first place my country was required to do so by the terms of the Geneva Convention. In the second place, the Germans had some thousands of American and British prisoners and I did not want to give Hitler the excuse or justification for treating our prisoners more harshly than he already was doing.

Dwight D. Eisenhower, *Crusade in Europe* 469 (1949).

General Eisenhower's reasoning remains just as valid today. The United States has enjoyed a long history as a leader in worldwide democracy, humanitarian law, and human rights law. But these past accomplishments and the principles of our past conduct do not seem compelling to other nations that have begun to rely on the United States' recent practices as excuses for their human rights abuses:

> African leaders with reputations for political intolerance have learned to use the war against terror as a justification for clamping down on the opposition. Uganda's president . . . and Zimbabwe's [president] . . . have on several occasions referred to their respective opposition elements as terrorists. Platitudes used in speeches by [President Bush] and [Israeli Prime Minister Sharon] have become favorite phrases of African leaders who say they want to "wipe out" or "liquidate" or "crush" the "infrastructure of terror."

Shehu Sani, *U.S. Actions Send a Bad Signal to Africa Inspiring Intolerance*, Int'l Herald Trib., Sept. 15, 2003, at 6; *see also id.* (noting "[t]he insistence by the Bush administration on keeping Taliban and Al Qaeda captives in indefinite detention in Guantánamo Bay . . . helps create a free license for tyranny in Africa").

The United States cannot afford to tarnish its reputation as the standard-bearer for democracy and human rights. If it does, it puts at risk the safety of the men and women of our armed forces and its own ability to insist on compliance by other nations with the norms of the Geneva Conventions.

II. REVIEW OF THE DECISION BELOW IS NEEDED TO CLARIFY THE MEANING AND REACH OF PRIOR DECISIONS OF THIS COURT

The decision below creates serious problems and inconsistencies in U.S. legal doctrine, and does so largely as a result of the lack of clarity in some of this Court's prior pronouncements in this area. The D.C. Circuit's conclusion that "no court in this country has jurisdiction" to hear the claims of alien detainees captured by the United States military during armed conflict and held outside of the territory of the United States (Al Odah App. at 14) cannot be reconciled with settled rules of justiciability; it improperly conflates questions of jurisdiction with merits determinations; and it subverts the proper scope of the Great Writ for those who seek to test the legality of their detentions.

The threshold conditions for *jurisdiction* are plainly satisfied here. The detainees have standing to sue, as they have suffered concrete injury (a restriction of liberty without certain procedural protections) caused by the defendants and redressable by the relief sought. And their lawsuits,

premised on claims of right arising under the Constitution, treaties of the United States, federal law, and federal military regulations, undeniably present federal questions.

Moreover, there exists a statutory cause of action for vindication of those rights. The federal habeas statute allows a district court to grant the writ to a prisoner if, *inter alia*, "[h]e is in custody under or by color of the authority of the United States" or "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c). As a textual matter, the availability of § 2241 to petitioners is clear. Indeed, as this Court has observed, challenges to executive detentions invoke the Great Writ's protections in their purest form. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention"); *id.* at 303-04 (noting "the historical use of habeas corpus to remedy unlawful executive action" and "to redress the improper exercise of official discretion").

In denying the detainees recourse to the courts, the D.C. Circuit, relying primarily on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), reasoned that the detainees have no substantive rights under U.S. law and therefore "cannot invoke the jurisdiction of [U.S.] courts to test the constitutionality or the legality of restraints on their liberty." (Al Odah App. at 16.) But it is well-settled that the existence *vel non* of a claim of right is separate from the question of subject-matter jurisdiction. *See Bell v. Hood*, 327 U.S. 678, 682-83 (1946). To the extent *Johnson* suggests otherwise and led the D.C. Circuit to conflate merits issues with the threshold issue of jurisdiction, that decision needs to be revisited and clarified by this Court.

Moreover, the D.C. Circuit's broad conclusion that, under *Johnson* and this Court's other precedents, alien detainees have *no* rights when detained by the United States military is

in conflict with prior pronouncements by this Court. While the Court's holdings on the applicability of the Constitution to aliens abroad have been somewhat unclear, the Court has never held that the rights of such aliens are non-existent. The Court's prior cases rejected only specific claims: *Johnson* held that prisoners of war did not have a right to be tried by civil, rather than military, tribunals, *see* 339 U.S. at 782-83, 785, and *United States v. Verdugo-Urquidez* held only that the Fourth Amendment did not apply to searches of foreign residences, *see* 494 U.S. 259, 275-76 (1990). Neither case held categorically that the Constitution or, in particular, the Due Process Clause of the Fifth Amendment, places *no restraints at all* on the Government's power to detain an alien indefinitely, without notice or an opportunity to contest before a tribunal (even a military one) the facts underlying that detention. To the contrary, in discussing the "coverage of our Constitution to nonresident alien enemies," *Johnson* acknowledged that alien enemies are "*entitled*" to precisely what petitioners seek here — a "judicial hearing to determine" their status. 339 U.S. at 784 (emphasis added).

Similarly, concurring in *Verdugo-Urquidez*, Justice Kennedy explained that courts must engage in a case-by-case adjudication of the extent to which constitutional limitations on the power of the United States must yield to other considerations, implying that some constitutional restrictions do apply when the Government acts on aliens abroad. *See* 494 U.S. at 277-78 (Kennedy, J., concurring) (noting that "[t]he proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances" (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring))); *see also id.* at 277 ("when the Government acts, in reference to an alien, within its sphere of foreign operations," the Court "must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate

power and authority abroad"). It is precisely the sort of case-by-case adjudication anticipated by Justice Kennedy that the decision below forestalls.

Moreover, this Court has recognized that even where a specific constitutional provision does not apply, rights can be made available to an alien abroad by "the political branches through diplomatic understanding, treaty, or legislation." *Verdugo-Urquidez*, 494 U.S. at 275. The rights asserted by petitioners here were created by the political branches and find expression in, among other things, the Geneva Conventions, which have been ratified by the United States, and in the Army regulations, which "implement[]" the Geneva Conventions, *see* Army Regulation 190-8 § 1-1b; *see also id.* § 1-1b(4) ("In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence.").

Indeed, the writ of habeas corpus has "traditionally issued as a means of reviewing the legality of the detention of aliens in the face of alleged treaty violations." *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 221 (3d Cir. 2003); *see also Mali v. Keeper of the Common Jail*, 120 U.S. 1, 11 (1877) (considering habeas corpus petition brought on behalf of alien sailor alleging violations of consular agreement between the United States and Belgium). Thus, in other contexts, the circuit courts have agreed that habeas relief is available under § 2241 for an individual who claims his continued detention violates a treaty, at least where the treaty has been implemented by federal law and regulations. *See, e.g., Ogbudimkpa*, 342 F.3d at 221 & n.24; *Wang v. Ashcroft*, 320 F.3d 130, 141 n.16 (2d Cir. 2003); *Saint Fort v. Ashcroft*, 329 F.3d 191, 202 (1st Cir. 2003). Similarly, courts "review military determinations by habeas corpus to insure that rights guaranteed by . . . military regulations are protected." *Allgood v. Kenan*, 470 F.2d 1071, 1073 (9th Cir. 1972); *see also Ornato v. Hoffman*, 546 F.2d 10, 14 (2d Cir. 1976) (noting that "habeas corpus is available . . . where there is a breach [by the military] of a self-imposed procedural regulation").[3]

There is, therefore, no valid basis for the D.C. Circuit's conclusion that the federal courts lack *jurisdiction* over petitioners' claims. Given the D.C. Circuit's reliance on *Johnson* and this Court's prior cases to reach this conclusion, it is evident that this Court needs to revisit these issues and bring needed clarity to this area of law. Doing so will not necessarily require the Court to decide the precise substantive scope of the detainees' rights under the Fifth Amendment or the Geneva Conventions. Nor will it require the Court to resolve the level of deference to be given to factual determinations of military officials. *Cf. Hamdi v. Rumsfeld*, 337 F.3d 335, 367 (4th Cir. 2003) (Luttig, J., dissenting from denial of rehearing *en banc*) (noting questions about the appropriate level of deference in a habeas proceeding brought by a U.S.-citizen detainee). Rather, the petitions raise only the narrow, but critical, question of whether, in a world in which the United States seeks to persuade other nations to govern in accordance with the rule of law, the United States will honor its own

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[3] That the military has implemented the Geneva Conventions in its regulations obviates the need to address whether the Conventions would otherwise be enforceable in U.S. courts. While the general rule is that a treaty must be "self-executing" to give rise to a cause of action, it is unclear whether this rule bars the assertion of treaty rights where another statute, such as § 2241, creates the cause of action. *See Ogbudimkpa*, 342 F.3d at 218 n.22 (explaining, but sidestepping, "the interesting issues . . . with respect to the availability of habeas relief under a non-self-executing treaty absent implementing legislation."). Whether the Geneva Conventions are self-executing is also unsettled. *See, e.g., United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992) (concluding that certain provisions of the Geneva Conventions are enforceable by POWs in court).

commitment thereto by providing a judicial forum for testing the legality of its detentions.

CONCLUSION

The petitions should be granted.

Respectfully submitted,

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